No.____

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

72-529

OCTOBER TERM, 1972

JACK P. F. GREMILLION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Jack P. F. Gremillion, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 19, 1972.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit which was filed on July 19, 1972,

is not yet reported and is printed as Appendix I to this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 19, 1972. A petition for rehearing was filed on August 1, 1972, and the Court granted a stay of the issuance of the mandate to October 7, 1972. This petition for certiorari is filed within thirty (30) days of the date of entry of the order denying the rehearing. This Court's jurisdiction is invoked under 28 United States Code, Section 1254(1).

QUESTIONS PRESENTED

(1) WHETHER THE ADMISSION UNDER THE BUSINESS RECORDS ACT OF A WORKSHEET, CONTAINING A VITALLY IMPORTANT MARGINAL NOTATION ALLEGEDLY MADE BY THE PERSON WHO PREPARED THE WORKSHEET, VIOLATED THE PETITIONER'S RIGHT TO CONFRONTATION OF WITNESSES IN THAT THE PERSON WHO ALLEGEDLY PREPARED THE WORKSHEET AND MADE THE MARGINAL NOTATION WAS NOT PRODUCED BY THE GOVERNMENT TO TESTIFY IN CONNECTION WITH THE WORKSHEET OR TO EXPLAIN THE NOTATION, NOR WAS THE NECESSARY FOUNDATION OF RELIABILITY OF THE RECORDS ESTABLISHED BY TESTIMONY FROM ANY OTHER PERSON.

(2) WHETHER THE GOVERNMENT COUNSEL'S REMARK DURING HIS OPENING ARGUMENT, PERTAINING TO A LOAN MADE TO PETITIONER, WHICH REMARK WAS DEEMED ERROR BY THE COURT OF APPEALS, WAS SO PREJUDICIAL AS TO DENY PETITIONER DUE PROCESS OF LAW.

(3) WHETHER THE ADMISSION INTO EVIDENCE OF A LETTER BEARING THE SIGNATURE OF A GOVERNMENT WITNESS BUT COMPOSED BY AN UNKNOWN AUTHOR VIOLATED THE PETITIONER'S RIGHT TO CONFRONTATION OF WITNESSES AND DENIED HIM DUE PROCESS OF LAW.

(4) WHETHER THE PETITIONER'S RIGHT TO BE FREE FROM RE-LITIGATION ON THE SAME ISSUES AND EVENTS WAS VIOLATED BY TRIAL FOR PERJURY FOLLOWING AN ACQUITTAL ON A CONSPIRACY CHARGE GROWING OUT OF THE SAME TRANSACTION.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED FIFTH AMENDMENT, UNITED STATES CONSTITUTION:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy

of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

SIXTH AMENDMENT, UNITED STATES CONSTITUTION:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

BUSINESS RECORDS ACT (28 USC Section 1732):

"(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowl-

edge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

(b) If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This subsection shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence."

RULE 8, FEDERAL RULES OF CRIMINAL PROCEDURE:

"(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

STATEMENT OF THE CASE

The United States Grand Jury for the Eastern District of Louisiana conducted an investigation of the affairs of the defunct Louisiana Loan & Thrift Corporation, said investigation resulting in the indictment of petitioner along with four other persons on charges of fraud in the sale of securities, mail fraud, sale of unregistered securities and conspiracy to commit these crimes. During the course of the Grand Jury investigation, petitioner voluntarily appeared before said Grand Jury and gave testimony which is alleged to be the basis for the present perjury prosecution. The

indictment which said Grand Jury returned was given the number 31,585 of the United States District Court for the Eastern District of Louisiana, New Orleans Division, and after a severance was granted to one defendant, the remaining four defendants were tried and acquitted by the jury on all counts of said indictment. Said indictment had been returned on February 14, 1969. Subsequent to said original indictment, but prior to petitioner's being acquitted thereon, the United States Grand Jury indicted petitioner for perjury in a five count indictment which is the subject of the case at hand.

The Grand Jury returned a true bill of indictment against petitioner Jack P. F. Gremillion on July 6, 1970. Petitioner was arraigned on July 29, 1970 and entered a plea of not-guilty. Among the pre-trial motions filed by petitioner were a motion to dismiss all counts of the indictment based upon lack of materiality to the investigation then being conducted by the Grand Jury and a motion to dismiss all counts based upon the doctrine of collateral estoppel. Both of said motions were overruled by the trial court. The trial commenced on September 20, 1971 and at the close of the Government's case, petitioner filed a motion for a judgment of acquittal which was overruled by the trial court. At the close of all evidence said motion for a judgment of acquittal was renewed by petitioner, and was again overruled by the Court. Following deliberation by the jury, a verdict was rendered against petitioner on all five counts of the indictment and he was adjudged guilty. The verdict was rendered on September 25,

1971. On October 27, 1971, petitioner filed a motion for a new trial and on November 24, 1971, said motion was denied. On December 1, 1971, petitioner filed a supplemental motion for a new trial, which was likewise denied. Petitioner was, on January 5, 1971, sentenced to a period of three years imprisonment on each of the five counts, said sentence to run concurrently. Petitioner filed a notice of appeal on January 14, 1972. The appeal was argued on June 15, 1972. The Court of Appeals judgment affirming the conviction was entered on July 19, 1972. A copy of said judgment is annexed as Appendix II to this Petition. A petition for rehearing, stay of mandate and continuance of bail pending certiorari was filed on August 1, 1972. The rehearing was denied on September 7, 1972. A copy of said order denying the rehearing is annexed as Appendix III to this Petition. The Court granted a stay of the issuance of the mandate to October 7, 1972. This petition for certiorari is filed within thirty (30) days of the date of entry of the order denying the rehearing.

REASONS FOR GRANTING CERTIORARI

I. THE DECISION OF THE COURTS BELOW REGARDING THE ADMISSIBILITY OF THE WORKSHEET UNDER THE BUSINESS RECORDS ACT, WITHOUT THE NECESSITY OF PRODUCING THE PERSON WHO PREPARED SAID WORKSHEET OR ANY OTHER PERSON TO ESTABLISH A FOUNDATION OF THE ALLEGED RELIABILITY OF SAID WORKSHEET, IS IN DIRECT CONFLICT WITH THE EXIST-

ING PERTINENT JURISPRUDENCE IN BOTH THE FIFTH CIRCUIT AND OTHER CIRCUITS.

Although the Business Records Act is designed to permit use of records of business transactions, rather than to require production of every person who took part in each transaction, it is well established that not all documents covered by this section are admissible in a criminal trial. See, e.g., *United States v. Lipscomb*, 435 F. 2d 795 (5th Cir., 1970), cert. den. 91 S. Ct. 1213, 401 U.S. 980, 28 L.Ed. 2d 331, rehearing den. 91 S. Ct. 1635, 402 U.S. 966, 29 L. Ed. 2d 131; *McDaniel v. United States*, 343 F. 2d 785 (5th Cir., 1965) cert. den. 86 S. Ct. 59, 382 U.S. 826, 15 L. Ed. 2d 71; *United States v. Re*, 336 F. 2d 306 (2nd Cir., 1964), cert. den. 379 U.S. 904, 85 S. Ct. 118, 13 L. Ed. 2d 177 (1964). The trial judge has a duty to carefully scrutinize any proffered business record to insure that it is reliable for the purpose for which it is offered into evidence. *Bowman v. Kaufman*, 387 F. 2d 582 (2nd Cir., 1967). The test of admissibility in such cases is that the record carry with it some guarantee of trustworthiness and reliability. *United States v. Grow*, 394 F. 2d 182 (4th Cir., 1968); *Smith v. Bear*, 237 F. 2d 79 (2nd Cir., 1956); *Hartzog v. United States*, 217 F. 2d 706 (4th Cir., 1954). Although the person who makes the record is not absolutely required to testify in order for the records to be admissible, it is necessary that someone testify concerning the reliability of the records, and the person who testifies must be in a position to attest to the authenticity of the records. *United States v. Teague*, 445 F. 2d 114 (7th Cir., 1971); *United States v. Daw-*

son, 400 F. 2d 194 (2nd Cir., 1968), cert. den. 89 S. Ct. 632, 393 U.S. 1023, 21 L. Ed. 2d 567.

The decision of the Courts below is in direct conflict with all of the above jurisprudence in that virtually all testimony pertaining to the business records of Louisiana Loan & Thrift Corporation established and emphasized that said records were completely unreliable, reference having been made to deliberately inflated shareholder lists, stock certificates having been made out in the names of persons who had no connection whatsoever with the corporation, deliberate alterations of minutes of meetings, etc. There was no testimony elicited to establish the reliability of this particular worksheet, and the only person who testified concerning this worksheet was definitely not in a position to attest to its authenticity.

The marginal notation was apparently intended to be an inter-office memorandum, according to the testimony of the Government witnesses. The Court of Appeals also viewed it as such. In admitting such a memorandum into evidence, the decision of the Courts below conflicts with the decision of the Ninth Circuit in *Standard Oil Company of California v. Moore*, 251 F. 2d 188 (9th Cir., 1957), cert. den. 356 U.S. 975, 78 S. Ct. 1139. In the *Standard Oil* case, the Court held that it was error to admit memoranda containing information attributed to others without any showing that the person supplying the information to the writer of the memorandum had the duty to do so. It was also held to be error to admit such memoranda without any

showing that the internal procedures of the company required that such writings be prepared, transmitted and filed systematically as a matter of established office routine. In the case at hand, there was no attempt by the Government to show that the person supplying the information to the writer of the memorandum had a duty to do so, nor that the internal procedures of the company required that such writings be prepared, transmitted, and filed systematically as a matter of established office routine.

Moreover, admissibility of a document under the Business Records Act necessarily involves a determination of whether or not the admission of such a document into evidence would violate the Sixth Amendment guarantee of confrontation of witnesses. *United States v. Knox*, 458 F. 2d 612 (5th Cir., 1972; *United States v. Williams*, 447 F. 2d 1285, (5th Cir., 1971) (en banc); *United States v. Smallwood*, 443 F. 2d 535 (8th Cir., 1971); *United States v. Lipscomb*, 435 F. 2d 795 (5th Cir., 1970), cert. den. 91 S.Ct. 1213, 401 U.S. 980, 28 L. Ed. 2d 331, rehearing den. 91 S.Ct. 1635, 402 U.S. 966, 29 L. Ed. 2d 131; *McDaniel v. United States*, 343 F. 2d 785 (5th Cir., 1965) cert. den. 86 S. Ct. 59, 382 U.S. 826, 15 L. Ed. 2d 71; *Greenhill v. United States*, 298 F. 2d 405 (5th Cir., 1962). In view of this constitutional guarantee of confrontation, the Government should produce the maker of any important record whenever possible in a criminal prosecution. See, e.g., *United States v. Johns-Manville Corporation*, 225 F. Supp. 61 (D.C. Pa., 1963).

The decision of Courts below is in direct conflict with the above additional jurisprudence pertaining to the guarantee of confrontation in that the person who prepared the worksheet and who allegedly made the marginal notation was never produced by the Government. Even those Fifth Circuit cases relied upon by the Court of Appeals in its opinion in this case specifically safeguard the defendant's right to confrontation. For example, in the *Knox* case, the Government's expert based his opinion concerning oil production on original production records of the leases in question, *which records had been previously introduced through the individual custodians of each of the records*, thus satisfying the Fifth Circuit test of admissibility set out in *United States v. Williams*, 447 F. 2d 1285 (5th Cir., 1971) (en banc). The *Williams* case involved an expert's opinion based upon his investigation of business records and documents which were not themselves introduced into evidence. The Court held that since the expert himself was present for cross-examination, there was no violation of the confrontation clause guarantee. The Court in *Williams* further stated that:

> "... Had the Government attempted to introduce the appraisal reports into evidence *without calling the expert who prepared them* and offering an opportunity for cross-examination, then Williams' right of confrontation would have been infringed ..." *Id.* at Page 1290. (Emphasis Added.)

These conflicts of the decision of the Courts below conflict with the present jurisprudence of both the

Fifth Circuit and other circuits justify the grant of certiorari to review the judgment below.

II. THE DECISION OF THE COURTS BELOW REGARDING THE ADMISSIBILITY OF THE WORKSHEET UNDER THE BUSINESS RECORDS ACT, WITHOUT THE NECESSITY OF PRODUCING THE PERSON WHO PREPARED SAID WORKSHEET OR ANY OTHER PERSON TO ESTABLISH A FOUNDATION OF THE ALLEGED RELIABILITY OF SAID WORKSHEET, PRESENTS A CONSTITUTIONAL QUESTION OF FAR-REACHING IMPORTANCE.

Resolution of the conflict between the decision of the Courts below and the current jurisprudence involves a determination of two vital issues:

(1) Whether a business record can be admitted into evidence merely because it is a business record, without any showing of reliability, trustworthiness, and authenticity.

(2) Whether the Business Records Act constitutes an exception to the Sixth Amendment right to confrontation of witnesses.

The far-reaching effect of determination of these two issues is readily apparent. If it is determined that any business record is admissible into evidence, whether or not a foundation of reliability and authenticity is laid, then any and all manner of incompetent and unreliable records will be able to be used against a defendant, resulting in untold prejudice, jury confusion, and miscarriages of justice. Moreover, if it is determined that the Business Records Act is to be an excep-

tion to the Sixth Amendment guarantee of confrontation of witnesses, a defendant will be put into an indefensible position whenever a business record is admitted against him since his right of cross-examination will be utterly useless if no person is produced for him to cross-examine.

The importance of resolution of these issues, coupled with the fact that this Court has never spoken definitively on the confrontation issue prior to this time, justifies the grant of certiorari to review the judgment below.

III. THE DECISION OF THE COURTS BELOW REGARDING THE PREJUDICIAL REMARKS MADE BY THE PROSECUTOR IN HIS OPENING STATEMENT IS IN CONFLICT WITH JURISPRUDENCE IN THE FIFTH CIRCUIT AND OTHER CIRCUITS AND CONSTITUTES A DENIAL OF DUE PROCESS TO THE PETITIONER.

In his opening statement to the jury, counsel for the Government made the following statement:

> "Now Ladies and Gentlemen, you will hear testimony that Mr. Gremillion received a loan for $42,700, repeat $42,700, from LL&T on or about November 30, 196....."

Counsel for petitioner objected on the ground that this statement was irrelevant to the charges. It was argued by counsel for the Government that this statement was relevant to the prejury prosecution as Count Two of the indictment was based upon petitioner's statement that he had no economic interest in LL&T

and that having a loan from LL&T was evidence of an economic or financial interest in the corporation.

The trial court held that counsel could argue later to the jury whether the loan had anything to do with the question of whether or not the petitioner committed perjury before the Grand Jury, and that the court would rule on it at that time.

In the charge to the jury, the Court defined an economic interest in a business as follows:

> "Economic interest in a business means ownership of the business, or a part of it. Economic interest in a corporation contemplates ownership of a right—such as a share of stock—that enables the holder to participate in the profits of the corporation or entitles the holder to realize from the corporation other financial gains or advantages."

The Court of Appeals agreed with petitioner that this charge by the trial court rendered the prosecutor's remark irrelevant and prejudicial, and that error ensued. The Court of Appeals felt, however, that the error was not "so prejudicial as to affect any substantial right of the defendant."

In considering this point, this Court must be made aware of certain other facts. Petitioner was at the time of this prejury prosecution Attorney General of the State of Louisiana. He had held this office for sixteen years. This loan mentioned by counsel for the Government in his opening statement was one of the vital issues in petitioner's previous trial No. 31,585 of the docket of the United States District Court for

the Eastern District of Louisiana, New Orleans Division, in which petitioner was acquitted. This loan went to make up part of the sum in excess of $200,000 which the local newspapers claimed that petitioner had received from the Louisiana Loan & Thrift Company. This was one of three loans made by Louisiana Loan & Thrift Company to petitioner which were widely publicized by the news media and bitterly criticized by the Government upon the trial of the previous case. The mention of this loan in the opening statement had no bearing whatsoever upon the issues in the perjury trial and could have served no purpose other than to prejudice the jury against the petitioner.

The jurisprudence is replete with cases in which a conviction was reversed because of improper and prejudicial statements made by the prosecutor during this opening statement or closing argument. See, e.g., *Hall v. United States*, 419 F. 2d 582 (5th Cir., 1969); *Government of Virgin Islands v. Oliver*, 360 F. 2d 297 (3rd Cir., 1966); *U.S. v. Clarke*, 343 F. 2d 90, (3rd Cir., 1965); *Leonard v. United States*, 277 F. 2d 834 (9th Cir., 1960); *United States v. Spangelet*, 258 F. 2d 338 (2nd Cir., 1958); *U.S. v. Pepe*, 247 F. 2d 838 (2nd Cir., 1957). By these and other cases, it has been well established that the minimum that the trial court should do is to instruct the jury not to consider the objectionable part of the argument. *Hall v. United States*, 419 F. 2d 582 (5th Cir., 1969); *United States v. Pepe*, 247 F. 2d 838 (2nd Cir., 1957). Moreover, in many cases, it has been held that even an instruction by the Court is not sufficient to cure the error

of an improper statement by a prosecutor. *Government of Virgin Islands v. Oliver*, 360 F. 2nd 297 (3rd Cir., 1966); *Leonard v. United States*, 227 F. 2d 834 (9th Cir., 1960); *United States v. Spangelet*, 258 F. 2d 338 (2nd Cir., 1958). In the case at hand, the trial court did not at any time instruct the jury to disregard this remark.

In light of the above discussed jurisprudence and the special circumstances relating to the publicity and notoriety of this case, it is submitted that these remarks of the prosecutor were indeed prejudicial to the petitioner, and the ensuing error can hardly be considered harmless in view of the fact that this was the jury's initial in-court exposure to the petitioner and the elements of the case. Such an error can hardly be considered cured by a jury charge on economic interest which was given six days after the prejudicial remarks were made. Consequently, at the very least, the petitioner should have been granted a new trial in compliance with the current jurisprudence in the Fifth Circuit and other circuits.

This conflict of the decision of the Courts below with the current jurisprudence of the Fifth Circuit and other circuits justifies the grant of certiorari to review the judgment below.

IV. THE DECISION OF THE COURTS BELOW REGARDING THE ADMISSION INTO EVIDENCE OF A LETTER OVER THE SIGNATURE OF A GOVERNMENT WITNESS, WHICH LETTER WAS COMPOSED BY AN

UNKNOWN AUTHOR, IS IN DIRECT CONFLICT WITH THE CURRENT JURISPRUDENCE OF THE FIFTH CIRCUIT AND OTHER CIRCUITS, DENIES THE PETITIONER DUE PROCESS OF LAW AND VIOLATES HIS RIGHT TO CONFRONTATION OF WITNESSES.

The letter in question bears the signature of a Government witness who testified that he did not know who had composed the letter. Admission of such a letter into evidence is such a glaring and obvious denial of petitioner's right to confrontation of witnesses that this point will not be discussed in detail. This Court is merely referred to the Sixth Amendment of the Constitution of the United States and such citations as are found in Reason Number I of Reasons for Granting Certiorari in this Petition. See also *State v. Adrian*, 453 P. 2d 221, 51 Haw. 125 (1969), in which the Court held that the defendant was denied the right of confrontation when certain letters were admitted into evidence against the defendant and defendant had no opportunity to cross-examine the writers of said letters who were not witnesses at the trial of defendant.

Petitioner also objected to admission of the letter into evidence on the grounds that said letter was in no way connected with petitioner and hence was irrelevant and immaterial to the issues. From the content of the letter, together with the fact that it is written on makeshift stationery, rather than on ordinary letterhead, it is obvious that the letter represents a questionable bit of the conduct in connection with the registration of

the Louisiana Loan & Thrift Corporation with the State Banking Commissioner. The last sentence of the said letter presents a legal opinion which is certainly open to serious question. This exhibit once again was nothing more than a move on the part of the prosecution to exhibit to the jury alleged misconduct by those who took part in the formation of Louisiana Loan & Thrift Company, including petitioner. Said letter had nothing to do with the issue of the truth or falsity of the statements made by petitioner upon which the perjury indictment was based. Its sole purpose was to inflame the jury by trying to indicate to them that petitioner took an active part in the administration of the affairs of Louisiana Loan & Thrift Company.

Even if one assumes *arguendo* that this exhibit had some slight probative value, the fact that it was an attempt to show wrongdoing by the petitioner in connection with his Louisiana Loan & Thrift activities, made its prejudicial character so far outweigh its assumed probative value that it should have been excluded under the doctrine of *United States v. Knohl*, 379 F. 2d 427 (2nd Cir., 1967), cert. den. 389 U.S. 973, 88 S. Ct. 472.

The following cases are examples of how the decision of the Courts below, *i.e.*, not to exclude this letter, conflicts with the current jurisprudence. In *United States v. Birns*, 395 F. 2d 943 (6th Cir., 1968), a perjury conviction was reversed because of the erroneous receipt into evidence of an exhibit in which the defendant admitted his prior conviction for tax fraud. The

Government sought to justify admission to show intent, design, scheme, motive or knowledge on the part of the defendant. The Court held that the information concerning the defendant's imprisonment had no logical tendency to establish the fact that he had made false statements as charged in the indictment and since he did not take the stand, its effect could only be prejudicial.

In *United States v. Stallings*, 437 F. 2d 1057 (5th Cir., 1971), a Dyer Act conviction was reversed by the Fifth Circuit on the ground that it was prejudicial error for the trial court to admit testimony that defendant had escaped from a penal institution the day before the alleged crime of transporting a stolen vehicle. The Government attempted to justify the introduction of the evidence on the ground that the jury might infer that the defendant committed the crime of knowingly transporting a stolen vehicle across state lines because he was anxious to make good his escape from a penal institution. "We think this connection is too tenuous to permit the introduction of such prejudicial evidence," said the Court. See also, *Davis v. United States*, 413 F. 2d 1226 (5th Cir., 1969); *United States v. Reid*, 410 F. 2d 1223 (7th Cir., 1969); *Thomas v. United States*, 376 F. 2d 564 (5th Cir., 1967); *South v. United States*, 368 F. 2d 202 (5th Cir., 1966), appeal after remand 412 F. 2d 697; *Marko v. United States*, 314 F. 2d 595 (5th Cir., 1963); *United States v. Accardo*, 298 F. 2d 133 (7th Cir., 1962); *Scott v. United States*, 263 F. 2d 398 (5th Cir., 1959).

This conflict of the decision of the Courts below with the current jurisprudence in the Fifth Circuit and other circuits justifies the grant of certiorari to review the judgment below.

V. THE DECISION OF THE COURTS BELOW REGARDING THE COLLATERAL ESTOPPEL AND DOUBLE JEOPARDY ISSUES IN THE CASE AT HAND IS IN DIRECT CONFLICT WITH THE CURRENT JURISPRUDENCE IN THIS HONORABLE COURT AS WELL AS WITH THE CURRENT JURISPRUDENCE IN SEVERAL OF THE APPELLATE CIRCUITS, AND AS SUCH VIOLATES PETITIONER'S FIFTH AMENDMENT RIGHTS.

According to the indictment filed on February 14, 1969, the conspiracy began on or about November 1, 1965, and continued through the date the indictment was filed. During this time interval the alleged perjury occurred.

While the sixteen count indictment was still pending, petitioner timely moved to consolidate the perjury charges against him with the charges contained in the sixteen count indictment so that all charges against him could be tried at one time, but the United States Attorney vigorously opposed the consolidation, and it was denied.

Petitioner's trial on the initial indictment began on April 5, 1971, and ended on May 19, 1971, at which time the twelve man jury which heard the case returned a unanimous verdict of "Not Guilty" on all sixteen counts. During the course of the trial the prosecution

introduced voluminous evidence in an attempt to prove that petitioner was a stockholder and/or had previously been a stockholder in Louisiana Loan & Thrift and had received a dividend and signed a proxy.

On September 20, 1971, petitioner went to trial on the perjury charges and a verdict of guilty on all counts was returned by the jury. The evidence, other than the statements made to the Grand Jury, constituted a rerun of the first trial with certain minor refinements.

Since the adoption of the Fifth Amendment to the United States Constitution all defendants in federal criminal prosecutions have been secure in the knowledge that they may not be tried twice for the same offense. The early narrow construction of the double jeopardy provision has given way to a more liberal and inclusive determination of what constitutes the same offense. No longer is a strict same evidence test controlling. Collateral estoppel and same transaction tests are applicable. The former in all prosecutions and the latter at least in all federal prosecutions.

Once an issue has been adjudicated in favor of a defendant, it may not be relitigated by the Government in a subsequent criminal proceeding. *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189 (1970); *Hanemann v. Florida*, 400 U.S. 2 (1971), 91 S. Ct. 13, vacating and remanding 221 So. 2d 228; *U.S. v. Fusco*, 427 F. 2d 361 (7th Cir., 1970).

In the *Fusco* case, *supra*, the Court pointed out that the United States Supreme Court in the *Ashe* case,

supra, decided that the doctrine of collateral estoppel in criminal prosecutions is embodied in the Fifth Amendment's guarantee against double jeopardy, and that this goes far beyond the "same evidence test" formerly thought by some courts to be necessary to constitute double jeopardy. In the *Fusco* case, the court also pointed out that the prosecution did precisely what was disapproved in the *Ashe* case: the prosecutor felt that the state had a provable case on the first charge, and when he lost the first case, he charged defendant with a different crime and refined his second presentation of the same evidence produced at the first trial in light of the turn of events at the first trial.

In the case at bar, the doctrine of collateral estoppel, as embodied in the Fifth Amendment, forbids the prosecution herein from doing the very thing condemned in the *Ashe* case: refining its presentation and making a second try with the same evidence produced at the first trial in the hope that another jury will find the evidence more convincing on the second go-round.

The "same transaction" or transactional finality doctrine proscribes a second trial for crimes arising out of the same transaction or motivated by the same intent. See Kircheimer, The Act, The Offense and Double Jeopardy, 58 Yale Law Journal 513, 534 (1949).

Were this not a federal prosecution, petitioner would initially be faced with the necessity of incorporating the "same transaction" doctrine into constitutional dimensions. In the instant case this necessity

does not arise. In a federal prosecution the same result is obtained by application of the general policy of the Federal Government; a policy clearly set forth in the case of *Petite v. U.S.*, 361 U.S. 529, 80 S. Ct. 450 (1960). In pertinent part it stated:

> "It is the general policy of the Federal Government 'that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a *policy dictated by considerations both of fairness to defendants* and of efficient and orderly law enforcements." (Emphasis Added.)

The underlying rationale of the "same transaction" theory has been pointed out by Justice Brennan. His separate opinion in *Abbate v. U.S.*, 359 U.S. 187, 79 S. Ct. 666 (1959), stated:

> "The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." 359 U.S. 187 at 196, citing from Green v. U.S., 355 U.S. 184, 187, 78 S. Ct. 221, 223 (1957).

More recently in a concurring opinion in the *Ashe* case he stated:

> "This 'same transaction' test of 'same offense' not only enforces the ancient prohibition against vexatious multiple prosecutions embodied in the Double Jeopardy Clause, but responds as well to the increasingly widespread recognition that the

consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best promotes justice, economy and convenience." *Ashe v. Swenson*, 397 U.S. 436, at 454.

The sole question is whether or not the prosecution of the petitioner for prejury constituted a second trial on issues which were part of the same transaction previously litigated in the first trial. As heretofore pointed out, the second trial was tantamount to an "instant replay" of the first trial. True, in some instances the presentation was somewhat more refined; however, the acquittal in the first trial dictated that the Government streamline, refine, glean and cull, the voluminous evidence presented in the first trial. Despite the attempt to disguise the substance of the trial it is easily ascertainable that the "Monday's hash" of the perjury trial is nothing more than the "warmed over roast" of Sunday's conspiracy trial.

Obviously, to come within the purview of the same transaction doctrine, it is necessary that the alleged perjury must have been committed within the time during which the purported conspiracy was still in existence and it must have had some reasonable relationship to the conspiracy itself.

Adopting the Government's own allegations it is obvious that the alleged offending testimony, given at the grand jury hearing prior to the date the indictment was filed, was well within the time limits of the purported conspiracy as established by the Government.

Secondly, does the alleged perjury before the

grand jury concerned matters involved in the alleged conspiracy? The Government made no contention that the questioned testimony before the grand jury was directed toward any issue other than the alleged conspiracy. The questions and answers at issue were all directed to the petitioner's connection with and interest in Louisiana Loan & Thrift and are certainly material and pertinent to the transaction. The issue of materiality of the evidence has been decided twice by courts below. If misleading or false testimony were given during the grand jury investigation, such testimony constitutes only one more step in the conspiracy and cannot form the basis for a subsequent prosecution.

The law is clear that efforts on the part of a defendant to conceal a conspiracy are in furtherance of or a part of the conspiracy, if the said act of concealment occurs within the period within which the conspiracy is in operation. *U.S. v. Hickey*, 360 F. 2d 127 (7th Cir., 1966), cert. den. 385 U.S. 928; *U.S. v. Etheridge*, 424 F 2d 951 (6th Cir, 1970), cert. dismissed 91 S. Ct. 2174; *U.S. v. Nowark*, 448 F. 2d 134 (7th Cir., 1971).

The conclusion is inescapable if, as the jury found, the petitioner committed perjury before the grand jury with reference to questions concerning his activities with Louisiana Loan & Thrift, the statements were an attempt to conceal his connection with the conspiracy and as such become a part of the conspiracy itself.

The Government cannot contend that the perjury and conspiracy cases were tried separately, either be-

cause there was no procedural vehicle to try them together or because the petitioner chose to have them tried in that matter. As pointed out earlier the petitioner specially requested, at a proper time, that the perjury and the conspiracy trials be held as one in order to avoid a burdensome series of litigation which would try the petitioner's health, peace of mind and financial position. The joinder was opposed vehemently by the Government and the trial judge denied the request, thus providing the opportunity for the Government to try the petitioner herein piecemeal.

Under Rule 8 of the Federal Rules of Criminal Procedure the conspiracy and perjury counts could and should have been tried at the same time. This is what was done recently in a case from the Second Circuit. In that case two similar counts were tried jointly even over the defendant's objection. The court in noting that the procedure was proper stated as follows:

> "We agree with the district court's disposition. Sweig's claim for a severance 'as a right' under Rule 8 fails because Rule 8(a) permits the joinder of two or more offenses against a single defendant if the offenses are based on 'two or more acts or transactions connected together or constituting parts of a common scheme or plan.' We believe that Sweig's acts constituting the basis for the conspiracy charges and those constituting the basis for the perjury charges were so connected. Virtually every overt act alleged in the conspiracy count formed the subject matter of one of the eight perjury counts, and would therefore be admissible in a perjury trial to show the falsity of

> Sweig's denial before the grand jury. Given such a clear case of commonality of proof, the conspiracy and perjury offenses were surely 'connected together' for purposes of Rule 8(a). Baker v. United States, 131 U.S. App. D.C. 7, 401 F. 2d 958, 971 (1968); cf. United States v. Kelley, 105 F. 2d 912, 916 (2nd Cir. 1939)." *U.S. v. Sweig*, 441 F. 2d 114, 118 (2nd Cir., 1971).

It is beyond dispute that the Government succeeded in dividing the alleged conspiracy into separate compartments so that in the event that it failed to obtain a conviction in the first it had a second bite at the apple. This is precisely the type of practice which is prohibited by the "same transaction" doctrine. The petitioner must be tried for all crimes arising out of the same transaction, and a decision by the jury as to that transaction is final as to all phases of it whether or not charged and tried at that particular time. The verdict of the jury acquitting the petitioner in the conspiracy case became the final word on that entire transaction.

This conflict of the decision of the Courts below with the existing jurisprudence in this Honorable Court and the Circuit Courts of Appeal, coupled with the far-reaching effect of resolution of said conflict, justifies the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully Submitted,

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CERTIFICATE

The undersigned, a member of the Bar of the United States Supreme Court, certify that a copy of the within application for writs, has been forwarded, postage prepaid, to the United States Attorney for the Eastern District of Louisiana, on this date.

New Orleans, La., this_____day of September, 1972.

F. IRVIN DYMOND
Attorney for petitioner

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-1133

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JACK P. F. GREMILLION,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

(July 19, 1972)

Before TUTTLE, CLARK and INGRAHAM, Circuit Judges.

CLARK, Circuit Judge: Jack P. F. Gremillion, former Attorney General of the state of Louisiana, was convicted on a five-count indictment for committing perjury before a Federal Grand Jury which was investigating the affairs of the Louisiana Loan & Thrift Corporation (LL&T) with regard to the sale of securities. The five statements made by Gremillion before

the Grand Jury on January 21, 1969 are set out *in extenso* in the margin.[1] In brief, they concern whether or not Gremillion was a stockholder or owner of any economic interest in LL&T. On this appeal, Gremillion urges that the subject statements were immaterial to the Grand Jury's investigation, that the government

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[1] I. "I do not nor have I ever owned stock in LL&T, even though I was asked to do so."

II. "* * * I have no economic interest in the corporation."

III. "There ain't no proxy. You are not going to find any because I didn't sign any."

IV. "Q—And would it be your testimony that that entry is completely in error then, on July 18, 1967?"

A—Why certainly, certainly.

Q—And since the time you have learned of this minute entry which is produced before the Ethics Committee, have you had occasion to talk with anybody in Louisiana Loan & Thrift or who was in Louisiana Loan & Thrift about this entry?

A—No sir, I have not. I have no reason to because it is entirely false."

V. "A—* * * I did receive a check for $700 from Mr. Glennon as a campaign contribution. The check was made out to Mr. Glennon and he endorsed it to me, and it was a campaign contribution * * *.

A—* * * Glennon endorsed it to me as a campaign contribution * * *.

Q—Mr. Glennon told you this was a campaign contribution?

A—That is what he told me. That is what I understood it to be.

Q—General, we referred earlier this morning to this check for $700 and let us show it to you now that you say was a campaign contribution.

A—That is right.

Q—It was the one of April 15, 1967, that is a copy thereof.

A—That is right.

Q—And it has the notation, "Dividend No. 1".

A—* * * that is the check that Glennon gave to me for campaign contribution, and I deposited it, yes, sir."

was collaterally estopped to prosecute for perjury by his acquittal on the charges which resulted from the investigation, and that the evidence against him was insufficient. He also presses eleven points of error in trial court rulings and procedure. We affirm.

After his testimony before the Grand Jury, Gremillion was indicted, along with several others, for fraudulent sale of securities, 15 U.S.C.A. § 77q(a) (1971), mail fraud, 18 U.S.C.A. § 1341 (1966), sale of unregistered securities, 15 U.S.C.A. § 77e(a) (1971), and conspiracy to commit these crimes, 18 U.S.C.A. § 371 (1966). Gremillion was acquitted on all counts, but before that acquittal, the Grand Jury returned the present indictment.

Gremillion's first contention is that his statements were not material to the Grand Jury's investigation of whether or not the above listed crimes had been committed, and thus the trial court erred in not dismissing all counts of the indictment. His contention has several prongs. First he points out that he truthfully informed the Grand Jury that he was an attorney for LL&T and had received a 10,000 dollar fee for his legal services. He further testified that he had been offered LL&T stock in exchange for this work but had spurned the offer. He urges that once he had admitted this much it became immaterial whether he was an attorney or a stockholder or both and in any case, that his relationship to LL&T was immaterial.

Under the perjury statute, 18 U.S.C.A. § 1621

(1966),[3] the false statements must be material to the matter in issue. *See Williams v. United States*, 239 F.2d 748 (5th Cir. 1957). The statements need only be material, however, to any proper matter of inquiry—not just to the main issue. *United States v. Culverhouse*, 436 F.2d 1068 (5th Cir. 1971). Materiality need only be established as of the time the answers were given, *United States v. Stone*, 429 F.2d 138 (2d Cir. 1970), and the Government has the burden of proving materiality. *Brooks v. United States*, 253 F.2d 362 (5th Cir. 1958). Materiality is a legal question to be decided by the court and is not an issue for the jury to determine. *United States v. Edmondson*, 410 F.2d 670 (5th Cir. 1969), *cert. denied* 396 U.S. 966; *Barnes v. United States*, 378 F.2d 646 (5th Cir. 1967), *cert. denied* 390 U.S. 972. The test of materiality is whether the false testimony was capable of influencing the tribunal on the issue, *Barnes v. United States*, *supra*, or whether the false testimony would have the natural effect or tendency to influence, impede, or dissuade the Grand Jury from pursuing its investigation. *United States v. McFarland*, 371 F.2d 701 (2d Cir. 1966) *United States v. Marchisio*, 344 F.2d 653 (2d Cir. 1965). The false

[3] Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

statements need not actually impede the investigation. *Vitello v. United States*, 425 F.2d 416 (9th Cir. 1970).

With these precepts as our polestars, we examine Gremillion's contentions and hold that his false statements were material. It is patent that Gremillion's relationship to LL&T was material to the matters in issue, especially to the stock transaction counts of the first indictment. A person who is related in some financial way to a corporation is certainly more likely to be involved with the corporation's securities than one who is a stranger or a mere professional employee, because his motivation of self-enrichment would serve as a more likely impetus for that involvement. This motivation would be most enhanced in a stockholder role since a stockholder would be directly aided pecuniarily if the corporation is benefited by selling its stock. In addition, a stockholder would normally be expected to have more influence than an attorney in making the decision to offer the corporation's securities.

Gremillion's materiality attack also focuses on individual counts of the indictment. For instance, he asserts Count II should have been dismissed because "economic interest" is not of sufficiently certain meaning to sustain a charge of perjury. We disagree. In the abstract, one could speculate as to the precise parameters that phrase could connote. But the Grand Jury was not working in the abstract. It was considering the matter in the concrete context of this case, and Gremillion, as a stockholder of LL&T, knew or posi-

tively should have known that an opposite answer was required. As to Count IV, Gremillion argues that the question of whether or not he talked to anyone in LL&T was clearly immaterial. Again, after moving the inquiry back to its actual setting, we demur. The minute entry referred to in this count concerned an LL&T stockholders' meeting and reflected the fact that the 10,000 shares of stock owned by Gremillion were represented by proxy. The question was whether after learning of this entry, he spoke to anyone at LL&T about it. We find this colloquy obviously material to the question of whether or not Gremillion was a stockholder. Any reasonable man, not a stockholder, who learns he is nevertheles shown on corporate records to be a stockholder, would have inquired about the entry. In addition, part of the thrust of Count IV was whether the entry was a false entry.

For his second point, Gremillion argues that the Government is collaterally estopped to retry this case since he was tried and acquitted on the same issues in the previous trial. The issues he contends to have been previously litigated are whether or not he was a stockholder, whether he received a dividend, and whether he signed a proxy. Gremillion notes that the first indictment alleged all of these facts and maintains that they were put into issue by his plea of not guilty. He further urges that the evidence in this case was a mere replay of the first trial. Finally, Gremillion contends that the "same transaction" theory, espoused by Mr. Justice Brennan in *Ashe v. Swenson*, 397 U.S. 436, 448,

90 S.Ct. 1189, 1197 (1970), controls the application of double jeopardy in federal cases.

We reject the latter contention out of hand. Even if the Supreme Court were to incorporate the "same transaction" theory into the double jeopardy clause, that theory would be clearly inapposite here. The perjury charges did not arise out of the same transaction as did the stock and mail fraud charges. The perjury charges arose at a different time and place from any of the other charges. The "same transaction" theory obviously contemplates several criminal charges arising from a single episode that is closely circumscribed in time and space.

As to Gremillion's former contention under this point, we hold that the Government was not collaterally estopped. Under *Ashe*, the test is " 'whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration' ". 397 U.S. at 444, 90 S. Ct. at 1194. Plainly there were innumerable issues upon which the jury in the prior trial could have based its acquittal. For instance, that jury could have found that Gremillion did not utilize the mails or any instrument of transportation or communication in interstate commerce, or that he did not defraud anyone, or that he was not involved in any offer or sale of securities. In fact, the "issues" raised by Gremillion appear to be only tangentially related to the issues that would arise out of those charges upon which he was acquitted.

Gremillion's sufficiency of the evidence attack is

principally based upon the dearth of evidence proving that he was a stockholder. Furthermore, he submits that as a matter of law any stock he received was void because it was received in violation of La. Const. art. 13, § 2 (1921), which proscribes stock issued without consideration and fictitious stock.[3] However, the evidence belies his principal argument. There was substantial evidence that Gremillion received the stock since the certificate was made out to him and his signature was on the back of the certificate; Gremillion's name appeared on LL&T's shareholders list; there was also substantial evidence that he received a dividend and voted his shares by proxy; and the proxy contained his signature. The latter point raised by Gremillion is an irrelevant consideration, even assuming arguendo that the stock issuance was in violation of the Louisiana Constitution. Clearly the proof showed Gremillion and LL&T were treating this stock as valid at the time he testified. He cannot choose to treat it as valid for his own beneficial purposes and lie about that existing relationship to an inquiring Grand Jury, then disavow its validity under this charge to insulate himself from the effect of his perjury. Such an approach would allow absolution where at the time of his testimony a witness may have had some arcane provision of the law in the back of his mind. The protection of the public interest in straightforward Grand

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[3] Corporations shall not issue stock or bonds except for labor done, or money or property actually received; and all fictitious issues of stock shall be void; and any corporation issuing such fictitious stock shall forfeit its charter.

Jury testimony could be destroyed by the recognition of any such theory.

The remainder of Gremillion's contentions concern alleged trial errors which he asserts individually and cumulatively resulted in an unfair trial. During opening argument, Government counsel made the following remark:

> Now ladies and gentlemen, you will hear testimony that Mr. Gremillion received a loan for $42,700.00, repeat $42,700.00, from LL&T on or about November 30, 196__

Defense counsel objected but was overruled because, as Government counsel argued, this statement was relevant to whether or not Gremillion had an economic interest in LL&T. The trial court, however, in its charge stated that economic interest related to *ownership* rights in a corporation. Gremillion asserts that this change by the trial court rendered the opening statement irrelevant and prejudicial. We agree that it did and that error ensued, but we hold that this error was not so prejudicial as to affect any substantial right of the defendant. Fed.R.Crim.P. 52(a).

A worksheet was introduced into evidence showing Gremillion as a stockholder and that dividend checks were due him. However, the words "keep in Bill Glennon's name" were written in the margin. The trial judge admitted the worksheet under the Business Records Act, 28 U.S.C.A. § 1732 (1966). An issue is raised that the worksheet was not prepared in the regular course of business, but the evidence proves other-

wise. Gremillion also argues that he should have been allowed to cross-examine the preparer of the worksheet. We disagree. *See United States v. Knox*, ____ F.2d____ (5th Cir. 1972) [No. 71-2233, March 14, 1972]. These records fully meet the requirements of admissibility detailed in *United States v. Wilkinson*, ____ F.2d ____ (5th Cir. 1972) [No. 71-2007, May 15, 1972]. *See also United States v. Hedge*, ____ F.2d ____ (5th Cir. 1972) [No. 27654, June 9, 1972]. Circumstances relating to the identity or competency of the preparer are relevant only to the weight of the evidence, not to its admissibility. *Gaussen v. United Fruit Co.*, 412 F.2d 72 (2d Cir. 1969). Additionally, Gremillion complains of the reliability of the marginal notation in that there was no showing as to the relationship in time between the alleged decision to keep stock in Glennon's name and the entry of the marginal notation. It need only be shown, however, that the records were routinely made within a reasonable time of the transactions. It need not be proven that each individual entry was entered within a reasonable time. We see nothing to impair the reliability of these records. The main body of the records as well as the marginal notations were handwritten. There were other marginal notations beside other names on the same list. Gremillion admits that the preparer of these records also entered the notation to which he objects. The notation was not prepared for purposes of litigation and is not otherwise self-serving. Finally, this notation could be viewed as an interoffice memo from the preparer transmitting instructions to another employee as to the preparation of di-

vidend checks. *Cf. McDaniel v. United States*, 343 F.2d 785 (5th Cir. 1965).

Gremillion complains of the admission of an alleged proxy for 2,000 shares of Class B voting stock because at the time of the Grand Jury testimony he was being questioned about a proxy for 10,000 shares. Unquestionably the proof showed that he did sign the proxy for the 2000 voting shares. This is enough. Gremillion testified that he did not sign *any* proxy. Additionally, the other 8,000 shares he owned were Class A non-voting shares as to which no proxy would be pertinent. Clearly this answer by Gremillion was intended to deny the execution of any and all proxies.

A registered mail return receipt signed by Mrs. Gremillion was admitted into evidence under the identifying testimony of an LL&T employee who mailed stock certificates to Gremillion. On cross-examination, this employee admitted that she was not positive this particular registered receipt was for the certificates, although she did know the certificates had been mailed in such a manner. Gremillion contends that this admission destroyed any probative value the evidence might have, and thus the trial court erred in not striking it. We hold that the evidence had probative value, and that the trial court did not abuse its discretion in refusing to strike it. Any discrepancies were for the jury. *Cf. United States v. Poe*, ____ F.2d ____ (5th Cir. 1972) [No. 72-1111, June 23, 1972].

Gremillion next argues that the tape recording and typed recording transcription of a Board of Directors'

meeting of LL&T should not have been admitted, or at least that the irrelevant and immaterial portions thereof should have been excised. He states that those portions that were arguably relevant deal only with his capacity as an attorney for LL&T and are not relevant to whether or not he was a stockholder. We do not agree that it was reversible error for the court to admit the entirety of the recording and transcription in order to permit the jury to determine the meaning of the statements. The trial court may have considered the other portions of the tape necessary to put Gremillion's statements in context. In any event, we discern no prejudice from the admission of any portion of the tape or transcript that might have been irrelevant.

Objection on relevancy grounds is made to testimony that Gremillion had worked on the composition of the LL&T passbook which was given to each depositor of LL&T. The Government had the burden of proving the materiality of the perjurious statements to the Grand Jury's investigation. This testimony was relevant to the Government's burden in that it cast light upon Gremillion's relationship to LL&T. In addition, the detailed extent of his intimacy with the corporate affairs would have been relevant to negate any contention that he may have been unaware of the economic interest he possessed. With one exception, the same reasoning also adequately disposes of Gremillion's argument that a letter over the signature of William Glennon, an LL&T official, to the State Bank Commissioner was not relevant. Gremillion states that

he should have been allowed to cross-examine the author of the "Glennon" letter, which dealt with the registration of LL&T. The letter was introduced through Glennon, who identified the letter and his signature thereon. Glennon testified that the letter was the joint product of several persons who were gathered with Gremillion in Gremillion's office. Some of the others present were available for cross-examination. Because of the communal nature of the document's creation, we hold Gremillion was not denied the right to cross-examine its "author".

In the same vein, we refuse to find the trial judge abused his discretion in permitting Glennon to testify that the pre-incorporation stock subscription list contained falsely inflated listings of stock ownership and that this listing and its falsity were known to Gremillion. The court ruled that it was admissible since it was permissible for the prosecution to show the extent of Gremillion's participation in the internal details relating to LL&T's formation. Such a ruling was consistent with the other rulings we have discussed above. Because this particular inquiry disclosed wrongful activity on the part of the defendant other than that charged in the indictment, it was properly the subject of close scrutiny. However, it was admissible evidence and the allowance of such proof was committed to the informed discretion of the trial judge. He held its probity outweighed its possible prejudice. Under the facts of the case at bar, we cannot find that this ruling was an abuse of his discretion.

Gremillion contends it was error to permit the scope of cross-examination of a witness he offered to exceed the direct examination of that witness. Without delving into the manner in which this restrictive rule of evidence would now be applied to a witness other than the defendant himself, *see United States v. Dillon*, 436 F.2d 1093 (5th Cir. 1971), we find no merit in this assignment of error because the record makes plain that the direct examination of this witness did open both lines of inquiry as to which complaint is now raised.

Gremillion argues that two requested instructions should have been given by the trial judge. As to the first of these,[4] he contends it was required because of the asserted error, discussed above, concerning whether the proxy he denied executing was for 10,000 shares or 200 shares. Since we have demonstrated that earlier contention was specious, the refusal of the instruction was not error.

The second requested instruction asserted to have been erroneously refused is set out in the margin.[5] Although stock certificates were issued in his name, he reasons that their invalidity under the Louisiana Constitution made his answers technically correct. We agree, as does the Government, that this requested

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[4] "A charge of perjury may not be sustained by lifting a statement of the accused out of its immediate context and thus giving it a meaning wholly different from that shown by its context."

[5] "There can be no lawful conviction in a perjury case where the answers of the defendant under oath to questions propounded to him are literally accurate, technically responsive or legally truthful."

instruction is a correct statement of the law. *See United States v. Wall*, 371 F.2d 398 (9th Cir. 1967); *Smith v. United States*, 169 F.2d 118 (6th Cir. 1948). But the refusal to give this particular instruction was not error since the remainder of the trial court's charge adequately covered the proposed instruction.

We have carefully considered all of Gremillion's allegations of error as a whole, to test their cumulative impact on the overall fairness of the trial accorded him and find that in total, as separately, they do not warrant reversal. The judgment and commitment is

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1971

No. 72-1133

D. C. Docket No. CR 32,295 E

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JACK P. F. GREMILLION,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

Before TUTTLE, CLARK and INGRAHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

July 19, 1972

Issued as Mandate:

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-1133

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JACK P. F. GREMILLION,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

(September 7, 1972)

ON PETITION FOR REHEARING

Before TUTTLE, CLARK and INGRAHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

B-3948, 9-72

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-529

JACK P. F. GREMILLION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted on five counts of giving perjured testimony before a grand jury in violation of 18 U.S.C. 1621 and was sentenced to imprisonment for concurrent three year terms. The court of appeals affirmed. 464 F. 2d 901 (Pet. App. 1).

The evidence showed that on January 21, 1969, petitioner, then Attorney General of the State of Louisiana, testified before a grand jury investigating the operations of a bankrupt loan company, The Louisi-

489-600—72

ana Loan and Thrift Corporation ("LL&T") (R. 68–69).[1] In the course of his testimony petitioner denied that he had any economic interest in LL&T, and these various denials formed the basis for the five perjury counts.[2]

There was sufficient evidence to show that the denials were false: in particular, that petitioner owned 10,000 shares of stock in LL&T, had signed a proxy reflecting ownership of at least 2,000 shares of voting stock, and had received dividends. (R. 88, 94–95, 146–147, 157–159, 189–190, 199, 579, 683, 847; Exh. 12, 13, 15, 16). There was also evidence of attempts to conceal his interest (R. 171–175, 187).

1. Petitioner challenges the admissibility of two documents: a work sheet prepared by clerical employees in the course of determining the persons eligible to receive LL&T dividend checks, and a letter to the Louisiana Banking Comissioner, which was intended to serve as the "opinion of counsel" required

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[1] "R." refers to volumes 2 and 3 of the three-volume record. We are lodging the record with the Clerk of this Court.

[2] Petitioner stated, "I do not nor have I ever owned stock in LL&T, even though I was asked to do so" (count 1). He also denied having any "economic interest" in LL&T (count 2), or ever executing a proxy reflecting shares of stock which he held (count 3). Petitioner further testified that a minute entry, showing that he was represented at a shareholders' meeting by a proxy, was false (count 4), and that a dividend check issued by LL&T made payable to one William Glennon, and endorsed by Glennon to petitioner who thereafter deposited it, was a campaign contribution (count 5) (Pet App. 32, n.1).

as part of an application to the State Securities Commission.[3]

a. The work sheet was admitted as a record made in the regular course of business. Mrs. Degan, the sole office employee of LL&T (R. 130), stated that the worksheet was prepared from information from other business records, and that she had personally prepared the last two pages. She further stated that she relied upon it to determine the names of shareholders entitled to receive dividend checks (R. 181–183). The work sheet was clearly admissible under the Federal Business Records Act, 28 U.S.C. 1732, as a record made in the course of "systematic conduct of the enterprise." *Palmer* v. *Hoffman,* 318 U.S. 109, 114. The claim that the secretary who prepared most of the document should have been called to testify was properly rejected at trial as not pertaining to the threshold question of admissibility (R. 183). Indeed, the federal statute was intended to eliminate the need to call the entrant of the business record as a precondition to admissibility. *Palmer* v. *Hoffman, supra,* 318 U.S. at 112–113, n. 3; *United States* v. *Teague,* 445 F. 2d 114, 119 (C.A. 7). The additional claims on appeal, addressed to the authenticity of the work sheets and the denial of the Sixth Amendment right to confront one's accusers, are equally without substance. The

[3] Both documents are irrelevant to some of the counts upon which petitioner was convicted (*e.g.*, counts 3 and 4, involving petitioner's execution of a proxy). In this circumstance, and in light of the imposition of equal concurrent sentences, this Court need not consider the challenges. Cf. *Benton* v. *Maryland,* 395 U.S. 784.

former contention ignores the trial record; the latter is contrary to settled law. See *United States* v. *Kelly*, 349 F. 2d 720, 770 (C.A. 2), certiorari denied, 384 U.S. 947; *McDaniel* v. *United States*, 343 F. 2d 785 (C.A. 5), certiorari denied, 382 U.S. 826; *Kay* v. *United States*, 255 F. 2d 476 (C.A. 4), certiorari denied, 358 U.S. 825; see also *Dutton* v. *Evans*, 400 U.S. 74.

b. The opinion letter was admitted following testimony by its signator that it was composed through the joint efforts of individuals gathered in petitioner's office, including petitioner (R. 591–596). The letter was relevant in showing that petitioner had an economic interest in LL&T, and was actively participating in measures designed to benefit the economic position of that company. In any event, in view of the other abundant evidence supporting the government's position, the letter could hardly have furnished the basis for conviction on any count. Accordingly, petitioner's contentions regarding it do not warrant further review.

2. In his opening remarks, government counsel referred to a loan of $42,700 obtained by petitioner from LL&T. Defense counsel's objection on the ground that the matter of loans was irrelevant was overruled by the trial judge, who indicated that he would rule on the relevance when the evidence was offered. The loan was not mentioned during trial. In his closing charge the court told the jury that statements and arguments of counsel were not evidence, and that they were to consider only the admissible evidence (R.

961–962). Moreover, the court defined "economic interest" as contemplating ownership of a business, or the right to participate in the profits or other financial benefits of the business (R. 968–969). In these circumstances, even if the prosecutor's opening reference to a loan was error, the court below properly ruled that it did not affect petitioner's substantial rights. See *United States* v. *Ramirez*, 367 F. 2d 813 (C.A. 7), certiorari denied, 385 U.S. 988; *Cook* v. *United States*, 354 F. 2d 529 (C.A. 9).

3. The grand jury before which the false testimony was given returned a separate sixteen-count indictment charging petitioner and several others with various mail fraud, conspiracy, and securities violations. The indictment alleged that the criminal conduct had continued to February 14, 1969, the date the indictment was filed. Following the subsequent return of the perjury indictment, petitioner moved to consolidate the charges; the motion was denied. Petitioner was acquitted on each of the sixteen charges under the first indictment, and claims that this acquittal barred the government from prosecuting the perjury charge. But despite petitioner's contention, the issues presented in the perjury case were not matters which were disposed of by the previous judgment. As the court of appeals noted, there were innumerable issues upon which the jury in the prior trial could have based its acquittal, and the ultimate fact questions involved in the perjury case were at most only tangentially related to the issues in the securities and mail fraud trial (Pet. App. 37). Therefore, under the

standard established in *Ashe* v. *Swenson*, 397 U.S. 436, 444, the court below correctly concluded that the perjury prosecution was not barred by the prior acquittal.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1972.

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[4] Petitioner's reliance upon *Petite* v. *United States*, 361 U.S. 529, is misplaced. That case involved an Executive policy against making several offenses arising out of the same transaction the subject of multiple prosecutions. The perjury charge and the prior charge in this case did not arise from a single transaction; nor would the exercise of prosecutorial discretion within constitutional limits be an appropriate subject for judicial review. *United States* v. *Williams*, 431 F. 2d 1168, 1173 (C.A. 5), affirmed *en banc*, 447 F. 2d 1285 (C.A. 5), certiorari denied, 405 U.S. 954; *United States* v. *Pappas*, 445 F. 2d 1194 (C.A. 3), certiorari denied *sub nom. Miechlich* v. *United States*, 404 U.S. 984; *United States* v. *Hutul*, 416 F. 2d 606, 626–627 (C.A. 7), certiorari denied, 396 U.S. 1012.

The only case cited by petitioner dealing with the uniting of a perjury charge with a prior conspiracy charge is *United States* v. *Sweig*, 441 F. 2d 114 (C.A. 2), certiorari denied, 403 U.S. 932. In *Sweig* the court of appeals approved the joinder because of the "commonality of proof" relating to both offenses (441 F. 2d at 119). In the present situation, unlike *Sweig*, the evidence supporting the perjury charge was not the same as that which supported the fraud and conspiracy charges; joinder under Rule 8, Fed. R. Cr. P., would therefore not have been warranted. Furthermore, Rule 8 provides for permissible joinder of several offenses in a single indictment; it does not *require* the joinder of all offenses that could permissibly be joined.

U.S. GOVERNMENT PRINTING OFFICE: 1972

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No. 72-529

DEC 6 1972

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

JACK P. F. GREMILLION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY TO THE SOLICITOR GENERAL'S MEMORANDUM IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

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No. 72-529

In the Supreme Court of the United States

OCTOBER TERM, 1972

JACK P. F. GREMILLION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY TO THE SOLICITOR GENERAL'S MEMORANDUM IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

Under ordinary circumstances, a reply to the United States' memorandum in opposition might not be necessary or in order. However, in the case at hand, the references to the alleged testimony of certain of the witnesses at the trial of the petitioner are so distorted and misleading, and so flagrantly untrue, that counsel for the petitioner has been compelled to reply to said memorandum.

On Page 3 of the Government memorandum, reference is made to a "Mrs. Degan, the sole office employee of LL&T (R. 130)." (Whether or not Mrs.

Degan was the sole employee of LL&T has great bearing on her competency to testify regarding the authenticity and preparation of the worksheet about which she was questioned.) Except for a short period of time at the inception of the LL&T Corporation, which was not at the time of the preparation of the worksheet, Mrs. Degan was *not* the sole employee of LL&T, and the trial record is replete with references to other employees. There is reference made at R. 132 [1] to Edna Robinson, another employee. (Note that this reference is made within two (2) *pages* of the record page cited by the Government in this connection.) Reference is made at R. 132-133 to a Mrs. Frances Brousse, another employee. Reference is again made to Edna Robinson and Frances Brousse at R. 169-170. Reference is made at R. 195 to "all of the girls in the office" having to participate in certain typing. Further reference is made to Edna Robinson at R. 213-214. At R. 280, the following appears:

"Q. (BY MR. DYMOND):

Now, how many people worked in LL&T, not including executive personnel?

A. (BY GOVERNMENT WITNESS JANYCE DEGAN):

About six or seven."

At R. 574, it is again indicated that there were several secretaries in the office of LL&T. It is difficult

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[1] As in the Government memorandum, "R" refers to the original record, which has been lodged with the Clerk of this Court.

to understand how the Government can in good faith assert in its memorandum that Mrs. Degan was the sole office employee of LL&T, especially in view of the fact that *all* of the above references to other employees occur in the testimony of Government witnesses.

Although Mrs. Degan did testify that the *last two pages* of the multi-page worksheet were prepared by herself (R. 181), she also testified that Edna Robinson had prepared the rest of the worksheet. (R. 178-181). It was unequivocally established, again by Government witness, that the allegedly incriminating marginal notation on the worksheet, "keep in Bill Glennon's name," was put there by Edna Robinson (R. 187), whom the Government never produced to testify concerning the marginal notation or anything else, despite the fact that the records, worksheets, etc., were prepared by Edna Robinson or pursuant to her orders. (See, *e.g.*, R. 288.)

On Pages 3-4 of the Government memorandum, the Government asserts that the claim on appeal addressed to the authenticity of the worksheets is without substance because it "ignores the trial record," the worksheet having been admitted as a business record made in the course of the "systematic conduct of the enterprise." Federal Business Records Act, 28 U.S.C. 1732. It is submitted that the Government had to "ignore the trial record" in order to make the above statement. The testimony of a Government witness established that the worksheet was prepared from the LL&T stock journals and ledgers (R. 179), which were later

shown to be inaccurate and deliberately falsified. Again, the record is replete with references to the completely unreliable nature of virtually every type of LL&T corporate record. Reference is made to stockholder lists compiled from information written on "backs of envelopes" (R. 137) and "scraps of paper" (R. 244), to stockholder lists containing names of persons definitely known *not* to own stock, (R. 138, R. 244-259, R. 264-274, R. 614-616); to deliberate falsification of the pre-incorporation stockholders list (R. 139-144, R. 209-210, R. 308, R. 614-616); to falsified stock records and certificates (R. 167-168, R. 248-259, R. 264-274, R. 616); and to alteration of minutes of corporate meetings (R. 304, R. 617-620). In view of the fact that *all* of the above references to the unreliability of the LL&T records are taken from the testimony of *Government witnesses*, the Government's assertion that the petitioner's claim on appeal is without substance is difficult to accept, and the Government's assertion, if anything, appears to be without substance.

The next point which the Government distorts is in reference to the opinion of counsel letter signed by the Government witness, William Glennon. Although Mr. Glennon did testify that the letter was a "joint effort" and was composed in the petitioner's presence, he did not testify that the petitioner was part of that joint effort, as the Government would have one believe on Page 4 of the Government memorandum. (R. 591-596.) Furthermore, the letter in question is merely an opinion of counsel, and Government witness William Glennon apparently was chief counsel for LL&T at the time in

question. (R. 243.) That an opinion of counsel letter demonstrates an economic interest in the corporation is a nebulous and elusive theory at best, although it is admittedly characteristic of the unique brand of logic which the Government has employed throughout this case.

Regarding the Government counsel's remarks in his opening argument about a loan of $42,700 made by LL&T to petitioner, it is simply unrealistic to assert that such an error can be cured by a general instruction given five days after the error, and the Court is respectfully referred to the petitioner's original petition for certiorari for a full discussion of this point.

The last issue to be considered is the petitioner's contention that the Government is collaterally estopped from prosecuting him for perjury because of his former acquittal on each of the sixteen counts of the indictment returned by the Grand Jury before whom he allegedly perjured himself. Only two points need to be made in regard to this issue. First, assuming that the petitioner did perjure himself before the Grand Jury, such action would constitute an attempt to conceal the "original conspiracy," of which charge he was acquitted, and consequently should be viewed as an integral part of said conspiracy and nothing more. Secondly, the Government has taken a completely inconsistent position in that it asserts on one hand that the allegedly perjured testimony given was material enough to the Grand Jury investigation to support a charge of perjury, and yet was not material enough to be, of necessity, considered by the jury who acquitted the petitioner of

sixteen charges contained in the indictment returned by said Grand Jury. The Court is referred to the petition for certiorari for a more complete discussion of these points.

As regards any dispute as to the law involved in this case, and how it should be applied, it is understandable that Government counsel and defense counsel might disagree. However, it is not at all understandable or tolerable that the Government should so grossly and deliberately distort and/or ignore the trial record itself, as is demonstrated in the first four points discussed in this response to the Government's memorandum. If one prefers not to ascribe any improper motives to the Government in regard to this matter, one can only assume that the author of the Government memorandum has not read the transcript of the trial. Perhaps it is fortunate as well that the memorandum was not a statement given under oath, or the author himself might have been indicted for perjury.

CONCLUSION

For these reasons, as well as those reasons urged in the orginial petition for a writ of certiorari, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitte ,

F. IRVIN DYMOND

ANITA H. GANUCHEAU

ROBERT S. LINK, JR.

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CERTIFICATE

The undersigned, a member of the bar of the United States Supreme Court, certifies that a copy of the enclosed reply to the Solicitor General's memorandum, has been forwarded postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, on this date.

New Orleans, Louisiana, this ____ day of ____, 1972.

F. IRVIN DYMOND
Attorney for Petitioner

B-4011, 12-72